The Fordeco Nos 12 and 17; The owners of and all other persons interested in the ships Fordeco No 12 and Fordeco No 17 v Shanghai Hai Xing Shipping Co Ltd, the owners of the ship Mv Xin Hua 10

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–16 OF 1998(S)
EUSOFF CHIN CHIEF JUSTICE, MOHAMED DZAIDDIN AND ZAKARIA YATIM FCJJ
4 JANUARY 2000

Civil Procedure *— Admiralty — Jurisdiction — Plaintiff issued and served writ in rem and warrant of arrest against two vessels owned by defendant in respect of same claim — Whether entire proceedings a nullity — Whether service of writ and warrant of arrest on only one vessel should be set aside for want of jurisdiction*

Civil Procedure *— Admiralty — Application for judgment on failure to lodge preliminary act — Defendant present at hearing of application — Whether plaintiff prima facie entitled to judgment unless defendant gave satisfactory explanation for failure to lodge preliminary act — Whether plaintiff required to satisfy court that claim is well founded before court gives judgment — Rules of the High Court 1980 O 70 r 18(3)*

The respondents/plaintiffs issued a writ in rem against the appellants/defendants being owners of two vessels, namely Fordeco No 12 and Fordeco No 17. The writ was indorsed with a claim to recover loss and damages from the defendants by reason of the collision of the plaintiffs' vessel with Fordeco No 17 which was towed by Fordeco No 12. The writ was then served on both vessels. The vessels were then arrested under a warrant of arrest. The appellants entered an unconditional appearance in the action. In compliance with O 70 r 17(1) of the Rules of the High Court 1980 ('the RHC'), the respondents lodged their preliminary act ('PA'). The appellants failed to file their PA within two months after entering an appearance in the action. The PA was only lodged seven days after the prescribed period. The respondents applied to the High Court for judgment (in default) against the appellants for failure to lodge the PA within the prescribed period under O 70 r 18(3) of the RHC. The appellants opposed to the application on the ground that the respondents' affidavit did not show that their claim was well founded in compliance with O 70 r 18(4).The High Court judge arrived at his finding based on the appearance of the appellants at the hearing of the application. It was held that it was implicit in r 18(4) and (5) that where the appellants appeared, the requirement of proof that the respondents' claim was well founded did not apply and they were prima facie entitled to judgment unless the appellants gave a satisfactory explanation why they did not lodge the PA within the prescribed period. The Court of Appeal (see [1998] 1 MLJ 668) affirmed the High Court decision. The appellants appealed. The questions of law upon which leave to appeal was granted for the determination of the court were: (i) whether the admiralty jurisdiction of the High Court in Malaya and Sabah and Sarawak can be validly invoked when the

plaintiff had issued and served a writ in rem and warrant of arrest against two vessels owned by a defendant in respect of the same claim; and (ii) whether on the hearing of a motion for judgment against a defendant for failure to lodge a preliminary act under O 70 r 18(3) of the RHC and the defendant appears, the plaintiff is required to satisfy the court that his claim is well founded before the court gives judgment for the claim.

Held:

(1) On the true construction of s 21(8) of the UK Supreme Court Act 1981, the plaintiff is limited to serving the writ on any one of the defendant's ships and arresting it. It does not prevent the issue of a writ naming more than one ship or of two or more writs each naming a different ship. Therefore, in the instant case, the respondents/plaintiffs were perfectly in order when they issued the writ in rem against the owners of both vessels. However, they could not serve the writ on both vessels and arrest them as the service and the arrest could only be effected on one of the vessels, the offending vessel. The entire proceedings was not a nullity for want of jurisdiction. It was a nullity only in respect of one of the vessels and therefore the service of the writ and the warrant of arrest on her should be set aside for want of jurisdiction (see pp 460F–H, 461A).

(2) The court could not agree with the respondents' contention that the respondents' claim came under s 20(2)(d) of the UK Act and that s 21(8) did not apply. Looking at the indorsement of the writ, it seemed clear that the plaintiffs' claim was for loss and damage of their ship by reason of being collided by the defendants' barge which was being towed by their tugboat. Although the damage was received by the plaintiffs' ship, the claim was based on damage done by a ship under para (2)(e). Damage received by a ship under para (2)(d) covers the case where damage is caused by a fixed object. Where the damage is caused by another ship, claims within this paragraph will often also fall within para (2)(e) (see p 460A–C).

(3) On the true construction of r 18(4) and (5), it is incumbent on the plaintiff to satisfy the court that his claim is well founded before the court can give judgment on the claim. It is an untenable proposition that under para (4) where on the hearing of the motion for judgment in default of filing the PA within the prescribed period, the plaintiff is required to satisfy the court that his claim is well founded only where the defendant does not appear at the hearing. The effect of para (4) is that where the defendant does not appear, the court cannot give judgment automatically because under para 5 the court may only give judgment for the claim where the plaintiff in accordance with the requirement under para (4) satisfies the court that his claim is well founded. Thus where the defendant does not appear on the

hearing, and the court is of opinion that judgment should be given for the plaintiff provided he proves his case, the court shall order the plaintiff's PA to be opened and require the plaintiff to satisfy the court that his claim is well founded. To construe the paragraph as was done by the judge means to disregard para (5) which is explicit that the court may give judgment if the plaintiff satisfies the court that his claim is well founded. It is for the plaintiff to prove his case and satisfy the court that his claim is well founded before the court grants him judgment on the claim whether or not the defendant appears at the hearing of the application (see p 463C–H).

(4) In the circumstances of the case, the court found that the High Court judge had misdirected himself by not considering the respondents' PA and the affidavit to satisfy himself that the respondents had proved their case and that the claim was well founded before giving judgment against the appellants (see p 465E).

[Bahasa Malaysia summary

Responden-responden/plaintif-plaintif telah mengeluarkan suatu writ in rem terhadap perayu-perayu/defendan-defendan sebagai pemilik dua buah kapal iaitu Fordeco No 12 dan Fordeco No 17. Writ telah diindorskan dengan tuntutan untuk mendapat kembali pampasan dan ganti rugi daripada defendan-defendan atas alasan pelanggaran kapal plaintif dengan Fordeco No 17 yang telah ditunda oleh Fordeco No 12. Kemudian writ diserahkan kepada kedua-dua buah kapal. Kapal-kapal tersebut kemudiannya ditahan di bawah suatu waran penahanan. Perayu-perayu telah memasuki kehadiran tidak bersyarat di dalam tindakan tersebut. Sebagai mematuhi A 70 k 17(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), responden-responden telah memasukkan tindakan awalan mereka ('TA tersebut'). Perayu-perayu gagal untuk memfailkan TA mereka dalam masa dua bulan selepas memasuki kehadiran di dalam tindakan tersebut. TA tersebut hanya dimasukkan dalam masa tujuh hari selepas tempoh yang diperuntukkan. Responden telah memohon kepada Mahkamah Tinggi untuk penghakiman (ingkar) terhadap perayu-perayu kerana kegagalan untuk memasukkan TA dalam tempoh masa yang ditetapkan di bawah A 70 k 18(3) KMT. Perayu-perayu telah menentang permohonan tersebut atas alasan bahawa afidavit responden tidak menunjukkan bahawa tuntutan mereka adalah berasas sebagai mematuhi A 70 k 18(4). Hakim Mahkamah Tinggi telah mencapai penemuannya berdasarkan kehadiran perayu-perayu semasa pendengaran permohonan tersebut. Adalah diputuskan bahawa adalah tersirat di dalam k 18(4) dan (5) bahawa di mana perayu-perayu hadir, keperluan membukti bahawa tuntutan responden adalah berasas tidak terpakai dan mereka secara prima facie berhak kepada penghakiman kecuali perayu-perayu memberikan

penjelasan yang memuaskan mengapa mereka tidak memasukkan TA di dalam masa yang diperuntukkan. Mahkamah Rayuan (lihat [1998] 1 MLJ 668) telah mensahkan keputusan Mahkamah Tinggi. Perayu-perayu telah merayu. Persoalan-persoalan undang-undang di mana kebenaran untuk merayu dibenarkan untuk penentuan mahkamah adalah: (i) sama ada bidang kuasa admiralti Mahkamah Tinggi Malaya dan Sabah dan Sarawak boleh dibangkitkan secara sah apabila plaintif telah mengeluarkan dan menyerahkan writ in rem dan waran penahanan terhadap dua kapal yang dimiliki oleh defendan berkenaan tuntutan yang sama; dan (ii) sama ada semasa pendengaran usul untuk suatu penghakiman terhadap seorang defendan untuk kegagalan memasukkan tindakan awalan di bawah A 70 k 18(3) KMT dan defendan telah hadir, plaintif diperlukan untuk memuaskan mahkamah bahawa tuntutannya mempunyai dasar yang kukuh sebelum mahkamah memberi penghakiman untuk tuntutan tersebut.

Diputuskan:

(1) Di atas penafsiran sebenar s 21(8) Akta Mahkamah Agung UK 1981, plaintif dihadkan untuk menyerahkan writ ke atas salah satu daripada kapal defendan dan menahannya. Ia tidak menghalang isu menamakan lebih daripada satu kapal dalam writ atau lebih writ dengan menamakan kapal yang berbeza. Oleh itu, di dalam kes ini, responden atau plaintif adalah teratur apabila mereka mengeluarkan writ in rem terhadap pemilik kedua-dua kapal. Namun, mereka tidak boleh menyerahkan writ ke atas kedua-dua kapal dan menahannya oleh kerana serahan dan penahanan tersebut hanyalah boleh dilaksanakan ke atas salah satu kapal-kapal, iaitu kapal yang membuat kesalahan tersebut. Ia adalah batal berkenaan dengan salah satu kapal dan dengan itu serahan writ dan juga waran penahanan ke atasnya patutlah diketepikan atas kekurangan bidang kuasa (lihat ms 460F–H, 461A).

(2) Mahkamah tidak boleh bersetuju dengan penegasan responden bahawa tuntutan responden adalah di bawah s 20(2) Akta UK dan s 21(8) tidak terpakai. Melihat kepada pengindorsan di writ, ia kelihatan jelas bahawa tuntutan plaintif adalah untuk kerugian dan kerosakan kapal mereka kerana berlanggar dengan baj defendan yang ditarik oleh kapal tunda. Walaupun kerosakan telah dialami oleh kapal plaintiff, tuntutan tersebut adalah berdasarkan kerosakan yang dilakukan oleh sebuah kapal di bawah para (2)(e). Kerosakan yang dialami oleh sebuah kapal di bawah para (2)(d) meliputi kes di mana kerosakan adalah diakibatkan oleh objek tetap. Apabila kerosakan diakibatkan oleh kapal yang lain, tuntutan di bawah perenggan ini pada kebiasaannya juga akan terjatuh di bawah para (2)(e) (lihat ms 460A–C).

(3) Di atas penafsiran sebenar k 18(4) dan (5), beban adalah di atas plaintif untuk memuaskan mahkamah bahawa tuntutannya adalah berasas sebelum mahkamah boleh memberi penghakiman

di atas tuntutan tersebut. Ia juga suatu hujahan yang tidak boleh diterima bahawa di bawah para (4) di mana semasa pendengaran usul untuk penghakiman ingkar bagi kegagalan memfailkan TA di dalam tempoh masa yang diperuntukkan, plaintiff adalah diperlukan untuk memuaskan mahkamah bahawa tuntutannya adalah berasas hanya bila defendan tidak hadir semasa pendengaran. Kesan para (4) adalah apabila defendan tidak hadir, mahkamah tidak boleh memberi penghakiman secara automatik kerana di bawah para 5 mahkamah hanya boleh memberi penghakiman untuk tuntutan di mana plaintif menurut keperluan di bawah para (4) memuaskan mahkamah bahawa tuntutannya adalah berasas. Oleh itu, di mana defendan tidak hadir semasa pendengaran, dan mahkamah berpendapat bahawa penghakiman patut diberikan kepada plaintif jika ia dapat membuktikan kesnya, mahkamah akan mengarah TA plaintif dibuka dan memerlukan plaintif untuk memuaskan mahkamah bahawa tuntutannya adalah berasas. Untuk menafsir perenggan tersebut seperti yang dilakukan oleh hakim adalah bermaksud untuk mengetepikan para (5) di mana adalah nyata bahawa mahkamah boleh memberi penghakiman jika plaintif memuaskan mahkamah bahawa tuntutannya adalah berasas. Adalah untuk plaintif membuktikan kesnya dan memuaskan mahkamah bahawa tuntutannya adalah berasas sebelum mahkamah memberikannya penghakiman di atas tuntutan tersebut tidak kira sama ada defendan hadir semasa pendengaran permohonan tersebut (lihat ms 463C–H).

(4) Di dalam keadaan-keadaan kes, mahkamah mendapati bahawa hakim Mahkamah Tinggi telah tersalah arah dengan tidak mempertimbangkan TA responden dan afidavit tersebut untuk memuaskannya bahawa responden-responden telah membuktikan kes mereka dan bahawa tuntutan tersebut adalah berasas sebelum memberikan penghakiman terhadap perayu-perayu (lihat ms 465E).]

Notes

For cases on admiralty generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 148–204.

Cases referred to

Aristocrat, The [1908] P 9 (refd)
Avro International, The [1988] 1 MLJ 147 (refd)
Banco, The [1971] 1 All ER 529 (refd)
'Brunei 602', Owners of Cargo Aboard MV v MV 'Hai Hin 28' Owners of & Anor [1984] 1 MLJ 227 (refd)
Damavand, The [1993] 2 SLR 717 (refd)
Eschersheim, The [1976] 2 Lloyd's Rep 1 (refd)
Freccia Del Nord, The [1989] 1 Lloyds Rep 388 (refd)

Neo Chan Eng v Koh Yong Hoe [1960] 26 MLJ 291 (refd) A
Ohm Mariana, The [1993] 2 SLR 698 (refd)
Stephan J, The [1985] 2 Lloyd's Rep 344 (refd)

Legislation referred to B

Administration of Justice Act 1956 s 3(4)
Courts of Judicature Act 1964 s 24(b)
Evidence Act 1950 s 101
UK Supreme Court Act 1981 s 20, 21, (8), 22, 23
Rules of the High Court 1980 O 70 rr 17(1), 18(3), (4), 20(3), (4) C

Appeal from: Court of Appeal Civil Appeal No S–02–211 of 1994 (Court of Appeal, Kota Kinabalu)

Simon KY Shim (*Shim Pang & Co*) for the appellants.
David Wong (*Francis Wong* with him) (*Peter Lo & Co*) for the respondents. D

Mohamed Dzaiddin FCJ (delivering judgment of the court): On 19 June 1993, the respondents, who are the plaintiffs in the admiralty suit commenced an action in rem in the High Court Sandakan against the appellants/defendants being owners of two vessels for loss and damage to their ship or vessel 'MV Xin Hua 10' of the Port of Shanghai while at E anchorage within an area of the allocated wharf in Sandakan when it was collided into by the appellants' barge 'Fordeco No 17' which was being towed by their tugboat 'Fordeco No 12'. By an indorsement on the writ, the respondents claimed that the loss and damage to their vessel was due to the negligence of the appellants, their servants or agents. On 24 June 1993, the respondents served the writ of summons in action in rem on the appellants' F tugboat 'Fordeco No 12' and barge 'Fordeco No 17'. Consequently, both vessels were arrested pursuant to a warrant of arrest dated 22 June 1993. On 13 July 1993, the appellants entered an unconditional appearance in the action by their solicitors, Messrs Shim Pang & Co. A month later on 13 August 1993, the respondents lodged their preliminary act (PA) in G compliance with O 70 r 17(1) of the Rules of the High Court 1980 ('the RHC') which, inter alia, states:

> In an action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships, unless the court otherwise orders, the plaintiff must, within 2 months after issue of the writ, and the defendant must, within 2 months after entering an appearance in the action, and before any pleading H is served lodge in the Registry a document (in these rules referred to as a 'preliminary act') containing a statement of the following particulars: ... .

It is common ground that the appellants failed to file their PA within two months after entering an appearance in the action. After an exchange of correspondence between solicitors, the appellants finally lodged their PA on I 20 September 1993, seven days after the prescribed period of two months from date of entry of appearance.

Proceedings in the High Court

On 21 September 1993, the respondents applied to the High Court Sandakan by motion for judgment (in default) against the appellants for failure to lodge the PA within the prescribed period under O 70 r 18(3) of the RHC. Rule 18(3) states:

> Where in such an action, being an action in rem, a defendant fails to lodge a preliminary act within the prescribed period, the plaintiff, if he has lodged such an act, may apply to the court by motion for judgment against that defendant, and it shall not be necessary for the plaintiff to file or serve a statement of claim or an affidavit before the hearing of the motion.

The notice of motion was supported by an affidavit of Mr Alexander Khoo Kay Mian, the respondents' advocate affirmed on 21 September 1993, who deposed in paras 11 and 12 to the following effect:

> 11 By virtue of O 70 r 18(3) of the Rules of the High Court 1980, the plaintiffs are entitled to apply to this Honourable Court by motion for judgment against the defendants who have failed to lodge a Preliminary Act within the prescribed period under O 70 r 17(1).
>
> 12 I verily believe that the plaintiffs' claim is well founded. As such, by virtue of O 70 r 18(5) of the Rules of the High Court 1980 the plaintiffs are entitled to apply to this Honourable Court by motion for an order that the defendants' tugboat 'Fordeco No 12' and scow 'Fordeco No 17' now under arrest as aforesaid be appraised and sold and that the judgment sum together with interest and costs of this action be paid out of the proceeds of the sale thereof.

The appellants by their advocate, Mr Simon Shim Kong Yip affirmed an affidavit in reply on 14 October 1993 opposing the motion for default judgment. He deposed that Mr Khoo's affidavit did not show that his client's claim was well founded in compliance with O 70 r 18(4) of the RHC. In addition, Mr Shim stated that the appellants were late in filing their PA because of the refusal of the respondents' solicitors to supply relevant documents pertaining to the alleged collision; the difficulty for the adjustors/surveyors to obtain evidence and to submit their reports to enable the appellants' solicitors to prepare the PA; the respondents' refusal to grant an extension of time.

The notice of motion for judgment was heard by the learned judge on 15 October 1993. On 5 September 1994 his Lordship gave judgment for the respondents and ordered damages to be assessed and costs.

In his grounds of judgment (pp 8–9 of the appeal record), his lordship stated as follows:

> The question which I have now to consider is whether in the circumstances of this case the court should give judgment against the defendants in default of lodging a preliminary act within the prescribed period. The relevant rule on this point is to be found in O 70 rr 18(4) and (5) which read as follows:
>
> (4) On the hearing of a motion under para (3) the court may make such order as it thinks just, and where the defendant does not appear on the hearing and the court is of the opinion that judgment should be

given for the plaintiff provided he proves his case, it shall order the plaintiff's preliminary act to be opened and require the plaintiff to satisfy the court that his claim is well founded.

The plaintiff's evidence may, unless the court otherwise order, be given by affidavit without any order or direction in that behalf.

(5) Where the plaintiff in accordance with a requirement under para (4) satisfies that his claim is well founded, the court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action is brought to be appraised and sold and the proceeds to be paid into court or make such order as it think just.

Learned counsel for the defendants contends to the effect that it is a prerequisite under the rule that the plaintiffs must satisfy the court that their claim is well founded in order to succeed in their application. Under this contention, he submits that para 2 of Mr Khoo's affidavit is an assertion and ought to be struck out for non-disclosure of the source of information or belief. The implication seems to be that without this paragraph, there is nothing in the affidavit to prove that the plaintiffs' claim is well founded to entitle the court to give judgment against the defendants ... Be that as it may, it appears implicit in the above-quoted rule that where the defendant appears on the hearing of the motion, the requirement of proof that the claim is well founded does not apply, and I am of the view that in such a case the plaintiff is prima facie entitled to judgment unless the defendant gives a satisfactory explanation why he did not lodge the preliminary act within the prescribed period.

On 8 November 1994, the appellants appealed to the Court of Appeal.

Proceedings in the Court of Appeal

We note from the appeal record that two principal grounds were canvassed before the Court of Appeal, one of which concerned the admiralty jurisdiction of the High Court of Sabah and Sarawak under s 21(8) of the UK Supreme Court Act 1981 read with s 24(b) of the Courts of Judicature Act 1964. The Court of Appeal did not appear to consider this jurisdictional point. The second ground was on the finding of the learned High Court judge which was founded on O 70 r 18(4) of the RHC. In dismissing the appellant's appeal, the Court of Appeal agreed with the reasons of the learned judge and held that on the proper construction of O 70 r 18(4) of the RHC and in the circumstances of the case where the appellants appeared at the hearing of the motion, the respondents need not prove that their claim was well founded and they were prima facie entitled to be given judgment unless the appellants could give a satisfactory explanation for their failure to file their PA within time.

Ahmad Fairuz JCA, delivering the judgment of the court, stated as follows (p 15 of the appeal record) at p 672E–673B ([1998] 1 MLJ 668):

The reading of both rr 18(3) and 18(4) shows that the court when hearing the respondents motion 'can make any order as it deems fair'. After these wordings there were arguments flooded with clarity in its meaning. Therefore, the clarity itself strengthen the appropriateness of the decision of the learned

trial judge — no need for the respondents to prove that their claim is well founded. There is no ambiguity in r 18(4). Thus we agreed with the learned trial judge that the respondents need not, in the circumstances that appears before the learned judge as he then was, to prove that their claim is well founded. In the circumstances, the appellants' argument about the need of the court to open the preliminary act of the respondents became weak for want of merit. In fact, we concur with the learned judge when he said that the respondents were prima facie entitled to be given judgment unless the appellants could give a satisfactory explanation as to why they did not lodge their preliminary act within the prescribed time period. And the appellant did give the explanation. And the explanation were taken into account by the learned trial judge. The Judgment of the learned trial judge summarised the explanation. According to the summary, the refusal or failure of the respondents to put forward the documents requested by the appellants was one of the reasons that caused the delay in lodging the appellants Preliminary Act. This, according to the learned trial judge, was not a valid reason for this delay. The correctness of the learned trial judge's opinion will be more obvious if rr 17(1)(i) to (xv), the Rules of the High Court 1980 were to scrutinized (sic). It is clear from the provision that the purpose of the preliminary action is as mentioned in the judgment of the learned trial judge, to obtain evidence from the related parties about 'recenti facto' situation and to avoid the defendant (the appellants in this appeal) from designing their case against the plaintiff (the respondents in this appeal) case. As such, the refusal of the respondents to put forward the documents cannot be made a ground to file their preliminary action late.

Appeal to this court

There are two questions of law, upon which leave to appeal was granted, for the determination of this court. The questions may be stated as follows:

(1) whether the admiralty jurisdiction of the High Court in Malaya and Sabah and Sarawak can be validly invoked when the plaintiff had issued and served a writ in rem and warrant of arrest against two vessels owned by a defendant in respect of the same claim.

(2) whether on the hearing of a motion for judgment against a defendant for failure to lodge a preliminary act (PA) under O 70 r 18(3) of the RHC and the defendant appears, the plaintiff is required to satisfy the court that his claim is well founded before the court gives judgment for the claim.

We heard the appeal on 14 June 1999 at Kota Kinabalu and adjourned our decision to enable counsel to submit further written submissions. On 27 July 1999, we delivered an oral judgment allowing the appeal with costs here and below, and the deposit to be refunded to the appellants. We set aside the order of the High Court dated 5 September 1994 and remitted the matter to the High Court Sandakan for full hearing and ordered that the parties be at liberty to apply to the said court for further directions to comply with the provisions of O 70 of the RHC. In addition, in view of our finding on question (1), we hereby make a further order that the writ in rem and warrant of arrest executed on the appellants' second vessel 'Fordeco No 12' be set aside.

We now give our reasons for allowing the appeal. A

On the jurisdiction point, the question for our decision is whether the admiralty jurisdiction of the High Court of Sabah and Sarawak can be validly invoked where the plaintiffs had issued and served a writ in rem and a warrant of arrest against vessels which are owned by the defendants in respect of the same claim. B

Short of repeating, the facts are quite straightforward. On 18 June 1993, the respondents/plaintiffs issued a writ *in rem* against the appellants/defendants being owners of two vessels, namely, 'Fordeco No 12' and 'Fordeco No 17'. The writ was indorsed with a claim to recover loss and damages from the defendants by reason of the collision of the plaintiff's vessel with 'Fordeco No 17' which was towed by 'Fordeco No 12'. The writ C was then served on both vessels on 24 June 1993. By warrant of arrest dated 22 June 1993, the plaintiffs caused both vessels to be arrested.

Submissions

Mr Simon Shim, counsel for the appellants, first submitted that the UK D Supreme Court Act 1981 (the UK Act) applies to our High Court under s 24(b) of the Courts of Judicature Act 1964 which states:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as E is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; ... .

Section 21(8) of the UK Act provides:

> Where as regards any such claim as is mentioned in section 20(2)(e) to (r), a ship has been served with a writ or arrested in an action in rem brought to F enforce that claim, no other ship may be served with a writ or arrested in that or any other action in rem brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.

Secondly, on the true construction of s 21(8) above, once a ship has been G served with a writ and arrested, no other ship in the same ownership may be served with the writ and arrested for the same claim. For the above proposition, counsel relied on two authorities. First, in *The Banco* [1971] 1 All ER 529, the plaintiffs issued a writ in rem against the defendants and arrested seven vessels owned by the defendants including the Banco. The defendants contended that under the Administration of Justice Act 1956, H s 3(4), the plaintiffs only had the right to arrest the Banco or any one other vessel in the same ownership. It is to be noted that ss 20–23 of the UK Act substantially derived from the Administration of Justice Act 1956, Pt I which has been repealed. Lane J held that accordingly, referring to the 1952 Maritime Convention, s 3(4) meant that the plaintiffs might arrest one ship of the defendants only, which might be the offending ship or alternatively, I any other ship in like ownership. On appeal by the plaintiffs, the Court of Appeal held that the meaning of s 3(4) was not ambiguous and the

defendants' construction of that section was correct. It held, per Lord Denning MR (at p 53) (Cairns LJ, dissenting):

> When a plaintiff brings an action in rem, the jurisdiction is invoked not when the writ is issued, but when it is served on the ship and the warrant of arrest is executed. The reason is because it is an action in rem against the very thing itself, and does not take effect until the thing is arrested. This means that the practice is right. The plaintiff is entitled, as soon as his cause of action arises, to issue his writ in rem against the offending ship and all other ships which at that time, ie, at the date of issue of the writ, belong to the same owner. That saves his time. Then he can wait until he finds the *one* ship which he thinks most suitable to arrest. Then he will serve her and execute a warrant of arrest against her. That having been done, he cannot go against the other ships and should strike them out of the writ.
>
> In my opinion, therefore, the judge was right in setting aside the service of the writ and warrant of arrest on all the vessels save *The Banco*.

In *The 'Stephan J'* [1985] 2 Lloyd's Rep 344, s 21(8) of the UK Act was considered. The issue before the QBD Court was whether the plaintiffs were entitled to arrest Stephan J if and when she came within the jurisdiction of the court. Sheen J stated as follows (p 346):

> Subsection (8) of s 21 of the Act was introduced to deal with the question raised in *The Banco*, [1971] 1 Lloyd's Rep 49; [1971] P 137. The purpose of sub-s 8 of s 21 is to make it quite clear that the plaintiff whose claim is within that part of the jurisdiction of the High Court which can be invoked by an action *in rem*, can arrest only one ship, either the offending ship or another ship in the same ownership, in accordance with the International Convention Relating to the Arrest of Seagoing Ships which was signed in Brussels in 1952, while at the same time preserving the practice, which started in 1956, of naming more than one ship on the writ, and then deleting all but one when the time came to serve the writ and arrest a ship. In my judgment sub-s 8 of s 21 cannot be interpreted in isolation. It must be interpreted in conjunction with sub-s 4 of the same section.

Counsel also referred us to: (1) *The Freccia Del Nord* [1989] 1 Lloyds Rep 388; and (2) *The Damavand* [1993] 2 SLR 717.

Therefore, based on the above authorities, counsel contended that the High Court Sandakan had jurisdiction only in respect of one vessel belonging to the appellants.

Thirdly, having issued a writ in rem against both vessels and warrant of arrest executed on them, the entire proceedings in the High Court of Sandakan became a nullity because its jurisdiction was invoked in excess of its powers conferred by statute. In addition, being a nullity, it could not be cured by an entry of unconditional appearance by the appellants, nor a waiver of a right to set aside the writ and warrant of arrest and any judgment made in pursuance of a null proceedings must be set aside ex debito justicae. Counsel relied on *The Avro International* [1988] 1 MLJ 147 at p 150 and *The Ohm Mariana* [1993] 2 SLR 698.

Mr DW Wong, for the respondents, in response to Mr Shim's written submission contended that there was no breach of s 21(8) of the UK Act

because the respondents' claim came under s 20(2)(d) for damage received by a ship, whereas s 21(8) was concerned with claims under s 20(2)(e) to (r). In the instant case, the respondents relied on s 20(2)(e), ie 'any claim for damage done by a ship'. In our view, looking at the indorsement of the writ, it seems clear that the plaintiffs' claim is for loss and damage to their ship by reason of being collided by the defendants' barge which was being towed by their tugboat. Although the damage was received by the plaintiffs' ship, the claim is based on damage done by a ship under para (2)(e). In *Halsbury Statute*, 4th Ed Vol 1, 1998 Reissue, the notes on s 20 of the UK Act at p 15 says that damage received by a ship under para (2)(d) covers the case where damage is caused by a fixed object, such as a pierhead. Where the damage is caused by another ship, claims within this paragraph will often also fall within para (2)(e). See also The *'Eschersheim'* [1976] 2 Lloyd's Rep 1. Hence, we cannot agree with Mr Wong's contention that the respondent's claim comes under s 20(2)(d) and that s 21(8) does not apply.

Conclusion on question (1)

The admiralty jurisdiction of the High Court of Sabah and Sarawak is governed by the UK Supreme Court Act 1981 by virtue of s 24(b) of the Courts of Judicature Act 1964. Based on the authorities discussed above, it is settled law that when a plaintiff brings an action in rem, the jurisdiction of the High Court is invoked, not when it is issued, but when it is served and warrant of arrest executed. The issue of the writ may be the start of the invocation of the jurisdiction, but the invocation is not complete until the writ is served or deemed to have been served as a result of the entry of appearance by the defendant before service is effected (see *The Banco* at p 57). When a plaintiff brings an action in rem against more than one ship belonging to the defendant, the jurisdiction is invoked when the writ is served and the warrant of arrest executed on one of the named ships. Therefore, on the true construction of s 21(8) of the UK Act, the plaintiff is limited to serving the writ on any one of the defendant's ships and arresting it. It does not prevent the issue of a writ naming more than one ship or of two or more writs each naming a different ship.

Therefore, in the instant case, we are of the view that the respondents/plaintiffs were perfectly in order when they issued the writ *in rem* against the owners of both vessels 'Fordeco No 12' and 'Fordeco No 17'. However, they could not serve the writ on both vessels and arrest them as the service and the arrest could only be effected on one of the vessels, the offending vessel. They are entitled to proceed against either one of the vessels. It is noted that the practice in the UK Admiralty Court since 1956 was to name more than one ship on the writ and then deleting all but one when the time came to serve the writ and arrest a ship. (*The 'Stephans J'*). Therefore, since service of the writ and warrant of arrest were executed on both vessels, the appellants ought to have applied to the court to set aside the service of the writ and warrant of arrest on one of the vessels. Instead, by their solicitors, they entered an unconditional appearance and now arguing before us that the writ in rem and warrant of arrest were null and void for want of

jurisdiction of the High Court. We reject the contention of learned counsel that the entire proceedings is a nullity for want of jurisdiction. In our view, it is a nullity only in respect of one of the vessels and therefore the service of the writ and the warrant of arrest on her should be set aside for want of jurisdiction. The decision of Lane J in *The Banco* [1970] 2 Lloyd's Rep 230 which was affirmed by the Court of Appeal, supra, is of much help. On 26 July 1970, the plaintiffs' motor vessel Monte Ulia collided with a jetty in the River Thames causing extensive damage. The plaintiffs alleged that that collision was caused by the negligent navigation or management of the defendants' motor tanker *Banco*. The plaintiffs issued a writ in rem against the defendants and arrested seven vessels owned by the defendants including the *Banco*. The defendants contended that under the Administration of Justice Act 1956, s 3(4), the plaintiffs only had the right to arrest the *Banco* or any one other vessel in the same ownership. Her ladyship held that accordingly, referring to the 1952 Maritime Convention, s 3(4) of the Administration of Justice Act meant that the plaintiffs might arrest one ship of the defendants only, which might be the offending ship or alternatively, any other ship in like ownership. Accordingly, she held that the plaintiffs were limited to arresting one of the defendants' ships. She then made an order setting aside the service of the writ and warrant of arrest on the six vessels save the *Banco* for want of jurisdiction and directing that the six ships be released from arrest forthwith. See also *'Brunei 602', Owners of Cargo Aboard MV v MV 'Hai Hin 28' Owners of & Anor* [1984] 1 MLJ 227 (CA, Singapore).

In the light of our above finding, we make an order setting aside the service of the writ in rem on the vessel 'Fordeco No 12' and discharging the warrant of arrest executed against her. This means the action against the offending vessel 'Fordeco No 17' should proceed.

Turning to question (2) on the interpretation of O 70 r 18(4), the following sub-rules are material:

> (3) Where in such an action, being an action *in rem*, a defendant fails to lodge a preliminary act within the prescribed period, the plaintiff, if he has lodged such an act, may apply to the court by motion for judgment against that defendant, and it shall not be necessary for the plaintiff to file or serve a statement of claim or an affidavit before the hearing of the motion.
>
> (4) On the hearing of a motion under para (3) the court may make such order as it thinks just, and where the defendant does not appear on the hearing and the court is of the opinion that judgment should be given for the plaintiff provided he proves his case, it shall order the plaintiff's preliminary act to be opened and require the plaintiff to satisfy the court that his claim is well founded.
>
> The plaintiff's evidence may, unless the court otherwise orders, be given by affidavit without any order or direction in that behalf.
>
> (5) Where the plaintiff in accordance with a requirement under para (4) satisfies the court that his claim is well founded, the court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action

is brought to be appraised and sold and the proceeds to be paid into court or make such order as it thinks just. A

Rule 18 deals with a procedure for obtaining judgment against a party in default of lodging a PA within the prescribed period. In an action in rem for damages occasioned by collisions between ships, a PA containing statements of fact must be filed by both parties. Under para (3) of r 18 where a defendant fails to lodge the PA within the prescribed period, the plaintiff, if he has lodged his PA, may apply to the court by motion for judgment against the defendant. The plaintiff need not file or serve a statement of claim or an affidavit before the hearing of the motion. By para (4), on the hearing of the motion for judgment the court may make such order as it thinks just. Where the defendant does not appear and the court is of the opinion that judgment should be given for the plaintiff provided he proves his case, the court shall order the plaintiff's PA to be opened and require him to satisfy the court that his claim is well founded, which unless the court otherwise orders, he may rely on affidavit evidence. B C

It will be recalled that the learned High Court judge arrived at his finding based on the appearance of the appellants by counsel, at the hearing of the motion. His Lordship held that it was implicit in rr 18(4) and (5) that where the appellants appeared, the requirement of proof that the respondent's claim was well founded did not apply, and they were prima facie entitled to judgment unless the appellants gave a satisfactory explanation why they did not lodge the PA within the prescribed period. The Court of Appeal affirmed the High Court decision and categorically stated that there was no ambiguity in r 18(4). D E

Submissions

Learned counsel for the appellants submitted that the courts below erred in law in the interpretation of O 70 r 18(4) and (5). He stated that the learned High Court judge was wrong in holding that the plaintiff's requirement of proof that his claim was well founded did not apply where the defendant appeared on the hearing of the motion and the plaintiff was *prima facie* entitled to judgment unless the defendant gave a satisfactory explanation why he did not lodge the PA within the prescribed period. Counsel contended that the words in r 18(4): 'and where the defendant does not appear on the hearing and the court is of opinion that judgment should be given for the plaintiff provided he proves his case ...' should be read disjunctively and could not be read to provide that only where the defendant did not appear that the plaintiff would have to prove his case. He stated that under the rule, even where the defendant did not appear, and the court was minded to grant judgment in default as a result of his non-attendance, the court could only grant judgment provided the plaintiff proved his case. According to counsel, this construction is borne out by r 18(5) which provides that where the plaintiff in accordance with the requirement of para (4) satisfies the court that his claim is well founded, the court may grant judgment. Counsel submitted that prior to judgment the court must be satisfied that the plaintiff's claim was well founded whether the defendant appeared or not at the hearing of the motion. F G H I

A In the light of the above submission, Mr Shim contended that the learned judge misdirected himself when he failed to apply his mind properly to the question whether the respondents had satisfied the court that their claim was well founded.

The response of counsel for the respondents did not assist us at all. He B replied that the burden was on the appellants to satisfy the court why judgment should not be granted and to show merits in their case, if any, which they failed to do so.

The question for our determination is whether it is implicit in r 18(4) and (5) of O 70 that where a defendant appears on the hearing of a motion for judgment the plaintiff is not required to satisfy the court that his claim C is well founded before judgment for the claim is given but is prima facie entitled to judgment unless the defendant gives a satisfactory explanation why he failed to file the PA within the prescribed period.

In our view, on the true construction of r 18(4) and (5), it is incumbent on the plaintiff to satisfy the court that his claim is well-founded before the D court can give judgment on the claim. It is an untenable proposition that under para (4) where on the hearing of the motion for judgment in default of filing the PA within the prescribed period, the plaintiff is required to satisfy the court that his claim is well-founded only where the defendant does not appear at the hearing. In our view, the effect of para (4) is that where the defendant does not appear, the court cannot give judgment E automatically because under para (5) the court may only give judgment for the claim where the plaintiff in accordance with the requirement under para 4 satisfies the court that his claim is well-founded. Thus, where the defendant does not appear on the hearing, and the court is of opinion that judgment should be given for the plaintiff provided he proves his case, the court shall order the plaintiff's PA to be opened and require the plaintiff to F satisfy the court that his claim is well founded. In another word, the court may give judgment upon the plaintiff satisfying the court that his claim is well-founded. To construe the paragraph as was done by the learned judge means to disregard para 5 which is explicit that the court may give judgment if the plaintiff satisfies the court that his claim is well-founded. The dictionary meaning of 'well-founded' is 'based on good evidence; having a G foundation in fact or reason'. (*The Oxford Concise Dictionary* (9th Ed)). Moreover, in our adversarial system of achieving justice, and as a matter of law and pleadings, the burden of proof lies on the party who substantially asserts the affirmative of the issue (s 101 of the Evidence Act 1950). Hence it is for the plaintiff to prove his case and satisfy the court that his claim is H well-founded before the court grants him judgment on the claim whether or not the defendant appears at the hearing of the application.

There are other considerations why we come to the above conclusion. First, the plaintiffs' claim in the instant case is for damages for negligence as a result of collision between a ship and a tugboat. What is the right of action here? An action lies whenever the plaintiff has suffered damage by I reason of the negligent performance of any duty which the defendant, his agent or servant owes to the plaintiff. There are three elements that together constitute the right of action for negligence, namely, duty, breach and

damage. (*Bullen & Leake & Jacob's on Precedents of Pleadings* (13th Ed, 1990) at p 678). Hence, the burden is on the plaintiff to prove these elements. It is settled law that the onus of proving negligence is on the plaintiff (*Neo Chan Eng v Koh Yong Hoe* [1960] MLJ 291). Thus applying this principle of law to the instant case, it is for the respondents to satisfy the court that their claim is well-founded.

Secondly, looking at r 18 it is clear the rule confers on the court an unfettered discretion which must be exercised judicially. It may dismiss a claim or make such other order as it thinks just or grant a judgment upon the motion. It may also, on such terms as it thinks just, set aside any judgment entered under this rule. Therefore, in exercising the discretion to grant judgment under r 18(5), regard must be had to the plaintiff satisfying the court that his claim is well-founded.

Thirdly, r 20(3) and (4) of O 70 in the context of default judgment would provide a guide in interpreting r 18(4). Where a defendant fails to enter an appearance (r 20(3)) or fails to serve a defence (r 20(4)) within the time limited under these rules, the plaintiff upon filing an affidavit proving service of the writ and upon filing an affidavit verifying the facts on which the action is based, and in the case of the defence, an affidavit that no defence was filed and served, may apply to the court for judgment by default. Under r 20(7), the court if satisfied that the applicant's claim is well-founded may give judgment. It does seem odd that under r 20(3) and (4) the plaintiff has to prove his case by an affidavit verifying the facts on which the action is based, but if the default is in filing the PA under r 18(4), as found by the learned judge, the plaintiff is not required to prove his case at all but is prima facie entitled to judgment unless the defendant satisfies the court why he failed to file the PA within time. It will be noted that in these cases, the defendant does not appear, yet the burden is different between an application under r 18 and r 20. In this regard, we agree with Mr Shim's submission that the learned judge applied the wrong test in holding that under r 18(4) the respondents were prima facie entitled to judgment without them proving the case and satisfying the court that their claim was well-founded.

Conclusion on question (2)

For the above reasons, we would answer the second question posed in the appeal as follows. Where in an action in rem, a defendant fails to file his PA within the prescribed period and the plaintiff applies for judgment in default against the defendant:

(1) If the defendant does not appear, the plaintiff must prove his case and the court shall order his PA to be opened and require him also to satisfy the court that his claim is well-founded. The plaintiff may rely on his affidavit.

(2) If the defendant appears at the hearing, the plaintiff must still satisfy the court that his claim is well-founded either by ordering the opening of his PA or by considering his affidavit before the court grants judgment under para (5) of r 18.

A We pause to stress here the importance of the PA. (See the observations of Lord Alvestone CJ in *The Aristocrat* [1908] P 9 at p 19). A PA is a written statement containing the particulars required under items (i) to (xv) of r 17(1). These particulars relate to the vessels involved in the collision. 'The object of the PA is to obtain from the parties statements of the fact at the time when they are fresh in their recollection. The other main B purpose is to force the parties to 'plead blind'. A statement of fact in a PA is a formal admission binding the party making it, and can only be departed from by 'special leave'. Compliance with the filing of the PA may enable the court under r 17(3) to order the trial of the action without pleadings. (The Supreme Court Practice 1997 1 para 75/18/1 p 1370).

C From the grounds of judgment of the learned High Court judge, it is clear to us that his Lordship did not order the respondents to open their PA to ascertain the facts of the collision. The only evidence before the court was the affidavit filed on behalf of the respondents, as applicants to the motion for judgment. Mr Alexander Khoo deposed in his affidavit dated 21 September 1993 that this was an action in rem to enforce a claim for loss D and damage suffered by the respondents' vessel arising out of the collision with the appellants' vessels. He did not set out the circumstances which led to the said collision, but merely stated that he verily believed that the respondents' claim was well founded and by virtue of r 18(5) they were entitled to apply for judgment and arrest of the appellants' vessels.

E In the circumstances of the case, we find that the learned judge had misdirected himself by not considering the respondents' PA and the affidavit to satisfy himself that the respondents had proved their case and that the claim was well-founded before giving judgment against the appellants.

F *The result*

For the reasons stated above, we confirm our oral decision made earlier and hereby make the following orders:

(1) The appeal is allowed with costs here and below.

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(2) The order of the High Court Sandakan dated 5 September is set aside.

(3) The service of the writ and warrant of arrest on the vessel 'Fordeco No 12' is set aside and be released from arrest forthwith.

(4) The case is remitted to the High Court Sandakan for full hearing and H parties are at liberty to apply to the court for further directions to comply with the provisions of O 70 of the RHC.

(5) Deposit lodged in court shall be refunded to the appellants.

Order accordingly.

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Reported by Jafisah Jaafar